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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No._____

T. E. GOODIN, SR., *Petitioner*

v.

CLINCHFIELD RAILROAD COMPANY, BLUE RIDGE LODGE No. 816 OF BROTHERHOOD OF RAILROAD TRAINMEN, GRADY BRIGGS, RODDY L. STEWART, J. O. GOFORTH, STEVE TOLBERT, JAKE E. WEBB, EDWARD H. TAYLOR, PAUL BOOHER, HARRY HOLLIFIELD, H. CLAY HOWARD, C. C. SLAGLE, J. L. MASTERS, FLOYD D. SPARKS, W. D. SLAGLE, SR., and JAMES GODSEY, *Respondents.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT of APPEALS FOR THE SIXTH CIRCUIT.

T. E. GOODIN, SR., respectively petitions that writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court, which, in sustaining motions for Summary Judgment dismissed the complaint, as amended, in which the petitioner and his co-plaintiffs below, on Federal Constitutional and statutory grounds, not only demanded the issuance of an injunction against the enforcement of an

alleged collective bargaining agreement threatened at the commencement of the action, and consummated *pendente lite,* and in consequence of which their private contracts of employment would be abrogated and their employment terminated, without recompense, and against their will, solely because of their age, but also demanded the entry of a declaratory judgment, declaring such alleged agreement to be illegal, void and unenforceable as to them.

CITATIONS TO OPINIONS BELOW

The *Per Curian* opinion of the Court of Appeals, printed in Appendix B, hereto, *infra,* p. 50, is reported in 229 F. 2nd 579. The opinion of the District Court (R.85a-102a), printed in Appendix B hereto *infra,* p. 26, is reported in 125 Fed. Supp. 441.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1956 (Appendix B, *infra,* p. 49). The application of the Petitioner for a rehearing was denied by order of the Court of Appeals, entered on March 26, 1956 (Appendix B, *infra,* p. 52). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a collective bargaining representative designated under the Railway Labor Act, 44 Stat. 577, 45 U. S. C. Secs. 151 *et seq.,* is possessed under the Federal Constitution and statutes of the power to make with the railroad carrier, whose employees it represents, a collective bargaining agreement abrogating the private contracts of employment of the minority of the employees it represents, and terminating their employ-

ment, without compensation, and against their will, solely because of their attainment of a stated age.

2. Whether Congress by its enactment of the Railroad Retirement Act, 50 Stat. 309, 45 U. S. C. Section 228b, (a) and (b), has occupied the field of retirement of railroad employees, so as to exclude it from the authorized subjects for collective bargaining under the Railway Labor Act, 44 Stat. 577, 45 U. S. C. Secs. 151 *et seq.*

3. Whether a labor organization designated as the collective bargaining representative under the Railway Labor Act, 44 Stat. 577, 45 U. S. C. Secs. 151 *et seq.*, is required to give to the minority non-member employees it represents, a notice and opportunity for a hearing, before making with the railroad carrier, whose employees it represents, a collective bargaining agreement abrogating the private contracts of employment of such minority non-member employees, and terminating their employment, without compensation, and against their will, solely because of their attainment of a stated age, in a case where the interest of such labor organization's members is hostile and adverse to the interest of the minority non-member employees.

Constitutional Provisions and Statutes Involved

The Constitutional and statutory provisions involved are the Commerce Clause contained in Article I, Section 8, Clause 3, the Due Process Clause contained in Amendment V, the Attainder Clause contained in Article I, Section 9, Clause 3, of the Constitution of the United States; Section 2 of the Railway Labor Act, 44 Stat. 577, as amended by Act approved June 21, 1934, 48 Stat. 1186, 45 U. S. C. Sec. 151a; "First",

"Third," "Fourth" and "Eighth" of Section 2 of the Railway Labor Act, 44 Stat. 577, as amended by Act of June 21, 1934, 48 Stat. 1186, 45 U. S. C. Sec. 152 "First," "Third," "Fourth" and "Eighth"; Part I, Section I of the Railroad Retirement Act, 50 Stat. 309, 45 U. S. C. Sec. 228b (a) and (b), and Railroad Retirement Tax Act, 53 Stat. 179, 180, 26 U. S. C. Secs. 1500 and 1520. They are printed in Appendix A. *Infra*, p. 17-24.

STATEMENT

Petitioner Goodin, along with his four co-plaintiffs below as the conductors over the age 70 years, commenced this suit against their employer, the respondent Railroad, and the respondent Union, which was the collective bargaining representative designated under the Railway Labor Act, 44, Stat. 577, 45 U. S. C. Sec. 151 *et seq.*, for the conductors and trainmen as separate classes, respectively, in the employment of the respondent Railroad. The individual respondents were officers and members of the respondent Union acting in concert and participating with it.

The purposes of this suit were to obtain a Declaratory Judgment under the Federal Declaratory Judgment Act, 62, St. 964, 28 U. S. C. Secs. 2201 *et seq.*, declaring that an alleged collective bargaining agreement, threatened at the commencement of the action, and consummated *pendente lite*, whereby Petitioner and his co-plaintiffs below would have had their private contracts of employment abrogated, and would be terminated in their employment, without compensation, and against their will, solely because of their attainment of the age of 70 years, was illegal, void and unenforceable against the petitioner and his co-plaintiffs below, and also to enjoin the enforcement of the alleged agreement.

Jurisdiction of the District Court was invoked on two grounds. First, the case arose under the Railway Labor Act, 44 Stat. 577, 45 U. S. C. Sec. 151 *et seq.*, and is an action of which such courts are given original jurisdiction, 62 Stat. 931, 28 U. S. C. Sec. 1337. And second, the case arose under the Due Process Clause of Amendment V and the Attainder Clause of Article

I, Section 9, Clause 3 of the Constitution of the United States and the Railway Labor Act, 44 Stat. 577, 45 U. S. C. Secs. 151 *et seq.*, wherein the matter in controversy exceeded the sum or value of $3,000 exclusive of interest and costs, and is one of which the District Courts are given original jurisdiction, 62 Stat. 930, 28 U. S. C. Sec. 1331.

Petitioner Goodin, and his co-plaintiffs below, Fink, Norris, Prince and Taylor were conductors employed by the Clinchfield Railroad (R-41a) which was engaged in interstate commerce (R-41a). Blue Ridge Lodge No. 816 of the Brotherhood of Railroad Trainmen, a labor union, was the collective bargaining representative designated under the Railway Labor Act for the conductors and trainmen respectively employed by the Clinchfield (R-18a, 26a). Both conductors and trainmen were eligible for membership in the Brotherhood of Railroad Trainmen (R-53a, 54a). Prior to the designation of the Brotherhood of Railroad Trainmen as the representative of the conductors class, the conductors had been represented by Clinchfield Division 545, Order of Railway Conductors (R-70a). Goodin, Fink, Norris and Prince held membership in the Order of Railway Conductors but were non-members of the Brotherhood of Railroad Trainmen; however, Taylor was a member of both unions (R-46a). Blue Ridge Lodge No. 816 of the Brotherhood of Railroad Trainmen hereinafter referred to as the Union, had about 191 members of whom 43 were conductors and 105 were trainmen in the employment of Clinchfield, and about 43 members had been previously so employed but because of reduction in force retirement or other reasons, were furloughed, but nonetheless, a large number of whom held seniority

and were entitled to recall to work when available (R-73a). The meetings of the Union were closed to non-members (R-47a).

Petitioner Goodin and his four co-plaintiffs below were all the conductors who were over the age of 70 years. And no trainman had attained that age (R-23a, 27a). Petitioner and his four co-plaintiffs below were competent, qualified and reliable to discharge all the duties of their employment as conductors (R-45a, 46a). Petitioner Goodin had worked for the Clinchfield for over 48 years (R-43a, 44a). In longevity of service in employment among the conductors, he ranked first, and his other co-plaintiffs below stood second, fourth, fifth and eighth. (R-34a, 36a). On the seniority list of conductors, Petitioner Goodin was also first, and his four co-plaintiffs below ranked third, fourth, fifth and eighth (R-45a). The seniority of the Petitioner Goodin had its inception prior to the first collective bargaining agreement (R-60a, 74a).

It had been the custom and usage at all times for conductors to continue in employment of the Clinchfield so long as they desired and were able to pass the physical and mental examinations (R-47a). The Clinchfield prior to the commencement of this action had never discharged a conductor without cause (R-58a, 59a), and the existing collective agreement provided that no conductor would be discharged without a hearing (R-76a).

On or about October 15, 1953, a thirty days notice was given by the Union to the Clinchfield, hereinafter referred to as the Carrier, that it desired to bargain with respect to the issue of compulsory retirement (R-aa5). Prior to the service of such notice by the Union

upon the Carrier, informal discussions had taken place among the Union members regarding compulsory retirement. In February, 1953, a meeting of the Union was held at which representatives of a similar class of employees from the Southern Railroad, upon invitation, were present, for the purpose of discussing compulsory retirement generally. At this meeting, consideration of the subject was postponed for sixty days (R-55a, 56a, aa3). About this time, the topic of compulsory retirement began to be discussed generally among all crafts of the Carrier and was a prime topic of conversation (R-aa2).

Thereafter the Union spread a referendum among its members upon the question as to whether it should seek an agreement with the Carrier establishing compulsory retirement at age 70. Non-members of the Union who were members of the class represented by it, were issued ballots, but were advised that their votes were to be treated as advisory only (R47a, 49a). Petitioner Goodin and his co-plaintiffs below protested both to the Union and to the Carrier at this time, stating that they objected to the proposed agreement, and deemed it illegal (R-28a, 67a, 77a, Ex. 4, 79a, 80a, Ex. 7). Nevertheless, the ballot was taken and a majority voted in favor of the proposed agreement (R-47a, 48a). However, the Carrier refused to recognize this referendum because the votes of the non-union members were not counted (R-24a). As a result, a second referendum was held in November, 1953, in which ballots were issued to every employee represented by the Union, whether members or not, upon the same proposition (R-aa2, aa3). Again, petitioner Goodin and his co-plaintiffs below protested to the Union (R-81a, 83a Ex. 9). The ballots were tabulated on or about

December 1, 1953 and a majority of the votes was in favor of the proposal (R-aa2, aa3). There had been no classification of ballots as to the respective classes. (R-31a).

Four days after the filing of the complaint, and following the service of the summons, the Union and Carrier entered into the following memorandum of agreement:

"Whereas, it is desired that an understanding be reached with respect to the retirement of employees (as represented by Brotherhood of Railroad Trainmen) who attain the age of seventy (70) years.

NOW, THEREFORE, IT IS UNDERSTOOD AND AGREED THAT:

All employees shall forfeit all seniority and retire from service effective at the end of the calendar month in which they attain age seventy (70) years, provided, however that no employee shall be required to retire under the provisions of this agreement before April 1, 1954." (R-78a, Ex. 5).

The immediate effect of this agreement was to require the involuntary separation and discharge of the petitioner and his co-plaintiffs below from their employment with the Carrier (R-49a-50a), and the further immediate effect would be to advance each member of the Union one or more places on the seniority list, advance about ninety percent of conductors and trainmen five full places on the list, and further to open work in the employment of the Carrier for five persons then furloughed (R-50a-51a).

The Petitioner and his co-plaintiffs below claimed that the memorandum of agreement violated their

rights and the duties of the Union to keep and perform the same under the Railway Labor Act and Due Process Clause of Amendment V, the Attainder Clause of Article I, Section 9, Clause 3, of the Constitution of the United States, and therefore was illegal, void and unenforceable (R-13a, 16a).

The District Court sustained the validity of the memorandum of agreement, and denied the relief sought (Appendix B, *infra*, p. 24).

Prior to the hearing in the Court of Appeals, petitioner and his co-appellants moved to substitute their own labor union for Respondent Union, as it had become their collective bargaining agent under an election held by the National Mediation Board. Consideration of the motion was passed (Appendix B, *infra*, p. 48), and was not referred to in the *Per Curiam* opinion affirming the judgment of the District Court (Appendix B, *infra*, p. 49).

Why The Writ Should Be Granted

1. Whether a railroad carrier and a representative designated under the Railway Labor Act for railroad workers may, by a collective bargaining agreement, abrogate the private contracts of employment of workers it represents and terminate their employment, without compensation, and against their will, solely because of their age, is an important question of Federal law which has not been, but should be, settled by this Court, and one which involves the rights of many people in a great industry. In view of the increasing number of able-bodied elderly citizens, and the necessity of providing them with work, the question here involved is one of grave national import and concern.

Similar agreements to the one here under consideration have been made by other railroads and statutory representatives of crafts of their employees, and it is reasonable to assume that others may contemplate such agreements. The Petitioner and others similarly affected by this and like collective agreements are having their private contracts of employment abrogated, and their employment terminated, without recompense, and against their will, even though they are conceded to be fully competent, qualified and reliable workmen to discharge all the duties of their employment. And in this case, such has been done by the action of an adversely interested majority, purporting to act in the name and under the authority of an office and duty created by Federal Statute. That a substantial doubt exists in the minds of many railroad employees that they are being validly deprived of their means of livelihood is demonstrated to some degree by the fact that such contracts are questioned

in widely separated areas of the country; *McMullan* v. *K. O. & G. Ry. Co.* (Petition for certiorari filed): *Boget* v. *C. & N. W. R. R. Co.* No. 51 C 902, N. D. Ill., unreported; *Ivy* v. *Southern Rwy. Co.*, E. D. Tenn., unreported; *Hughes* v. *Southern Ry. Co.*, N. D. Ala., pending; *Lamon v. Georgia, S. & F. Rwy. Co.*, Sup. Ct. Ga.; *McCabe vs. P. & L. E. R. R., C. P. Mahoning Co.*, Ohio, unreported. *Jones v. Fla. E. C. Ry. D. C. S. D. Fla.* pending. A review of the District Courts opinion in this case, which was affirmed by the *Per Curiam* opinion of the Court of Appeals, is vitally important because it is the first reported opinion on the subject, and has been followed in all the subsequent cases.

The judgment of the court below, is erroneous, we believe, in that an adequate distinction is not made between the law relating to the railroad industry and the law relating to other industries engaged in interstate commerce. The Railway Labor Act, 45 U.S.C. 152, authorizes collective bargaining concerning "rates of pay, rules and working conditions." In holding that the bargaining language of the National Labor Relations Act, 29 U. S. C. 141 *et seq.*, which reads "rates of pay, wages, hours of employment, or other conditions of employment", was sufficiently broad to authorize bargaining concerning retirement between an employer and employee in the Steel industry, in a situation where a company pension was offered, the court in *Inland Steel Co. v. N L R B,* (7th Cir.) 170 F. 2nd 247, 12 A. L. R. 2nd 240, certiorari denied 336 U. S. 960, pointed out that a comparison of the language of the two acts shows that in the National Labor Relations Act Congress "must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act", and also had

before it compensation to be made by the Steel companies for the compulsory retirement in the form of a pension. Also of great significance is the fact that for the railroad industry Congress enacted the Railroad Retirement Act. 45 U. S. C. 228 (b) and the Railroad Retirement Tax Act, 26 U. S. C. 1500, *et seq.*, which together provide a complete and comprehensive system of retirement with pay for railroad employees and the means of financing it. In no other industry is this true. The Acts provide for no amendment by private parties, which is the legislative result reached by the decision of the court below. Neither has Congress amended the Railway Labor Act so as to include retirement under the bargaining terms of said Act, or indicated such inclusion. Actually by the amendment of 1951 to the Retirement Act, permitting employees to use all service after 65 in the computation of their annuity benefits, retroactively, it indicated disapproval of early retirements in line with the penalty imposed upon those who retire before 65. The lower court disregarded this amendment, (Appendix B, *Infra*, p. 35-36). When it is further considered that an obvious objection of the Retirement Acts is uniformity throughout the industry, it becomes apparent that leaving the age of retirement for private agreement could not have been intended as it would result in a complete lack of uniformity. It is not believed that Congress could have intended that able-bodied men in one craft build up thir retirement annuity while other able-bodied men in a similar craft are prevented from increasing their annuity by such so-called bargaining agreements.

2. Further, the Court of Appeals in holding in this case that the memorandum agreement was valid as a

collective bargaining agreement has decided a Federal question, we submit, in direct conflict with the decisions of this Court in *Railroad Retirement Board v. Alton R. R. Co.*, 295 U. S. 330, (1935) and *Smith v. Texas*, 233 U. S. 630 (1914).

The Petitioner had, by virtue of his seniority, and longevity of service, a preferential right in his employment over all the members represented by the Union. That such a right is a property right has been held by the Seventh Circuit Court of Appeals in *Nord v. Griffin*, 86 F. 2nd 481, cert. denied, in direct conflict with the opinion here. Whatever it may be called, to permit the statutory agent of an involuntary principal to irrevocably terminate such principal's employment without notice, without hearing, and without compensation and against his will, is a violation of our concept of fundamental human rghts. This Court has held that "whatever else may be certain about the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure." *Ochoa v. Morales*, 230 U. S. 139.

It is our final position that the lower court was in error in not holding that the classification of the employees was so arbitrary, unreasonable and capricious as to deprive them of their liberty and property without due process of law in violation of Amendment V to the Constitution. Obviously, the Union was acting as a Federal instrumentality. The abrogation of existing private contracts of employment and the termination of existing employment, solely because of age, where the workmen are physically and mentally capable in all respects of performing their work, bears

no relation to the authorized purposes of collective bargaining under the Railway Labor Act.

In *Smith v. Texas, supra,* this Court held under Amendment XIV to the Constitution that state action not relevant to the authorized purpose of the exercise of the police power constituted a denial of liberty and property without due process of law and was void. By analogy, the same rule should apply in this case to the action of the Federal instrumentality assailed by the Petitioner.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

Commerce Clause, Article 1, Section 8, Clause 3:

The Congress shall have power ***

To regulate Commerce with foreign nations and among the Indian Tribes.

***

Due Process Clause, contained in Amendment V:

No person shall ***

be deprived of life, liberty and property, without due process of law. ***

Attainder Clause, Article 1, Section 9, clause 3;

No Bill of Attainder or ex post facto Law shall be passed.

STATUTES INVOLVED

45 U.S.C. 15la:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agree-

ments covering rates of pay, rules, or working conditions.

45 U. S. C. 152, First:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organiz-

ing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of labor organization."

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them."

45 U. S. C. 228b, (a) and (b):

"(a) The following-described individuals, if they

shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in Section 228a (a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

"1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

"2. Women who will have attained the age of sixty and will have completed thirty years of service.

"3 Individuals who will have attained the age of sixty and will have completed thirty years of service, but the annuity of such an individual shall be reduced by one one-hundred-and-eightieth for each calendar month that he is under age sixty-five when his annuity begins to accrue.

"4. Individuals having a current connection with the railroad industry, and whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (i) will have completed twenty years of service or (ii) will have attained the age of sixty. The Board, with the cooperation of employers and employees, shall secure the establishment of standards determining the physical and mental conditions which permanently disqualify employees for work in the several occupations in the railroad industry, and the Board, employers, and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. An individual's condition shall be deemed to be disabling for work in his

regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established; if the employee will not have been so disqualified by his employer, the Board shall determine whether his condition is disabling for work in his regular occupation in accordance with the standards generally established; and, if the employee's regular occupation is not one with respect to which standards will have been established, the standards relating to a reasonably comparable occupation shall be used. If there is no such comparable occupation the Board shall determine whether the employee's condition is disabling for work in his regular occupation by determining whether under the practices generally prevailing in industries in which such occupation exists such condition is a permanent disqualification for work in such occupation. For the purposes of this section, an employee's 'regular occupation' shall be deemed to be the occupation in which he will have been engaged in more calendar months than the calendar months in which he will have been engaged in any other occupation during the last preceding five calendar years, whether or not consecutive, in each of which years he will have earned wages or salary, except that, if an employee establishes that during the last fifteen consecutive calendar years he will have been engaged in another occupation in one-half or more of all the months in which he will have earned wages or salary, he may claim such other occupation as his regular occupation; or

"5. Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

"Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for in paragraphs 4 or 5 of this subsection and of the continuance of such disability (according to the standards applied in the establishment of such disability, until the employee attains the age of sixty-five). If the individual fails to comply with the requirements prescribed by the Board as to proof of the continuance of the disability until he attains the age of sixty-five years, his right to an annuity by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraphs 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him.

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals men-

tioned in sub-divisions 4 and 5 of sub-section (a) of this section prior to attaining age sixty-five."

26 U. S. C. 1500:

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation, paid to such employee after December 31, 1956, for services rendered by him after such date, as is not in excess of $300 for any calendar month before July 1, 1954, and as is not in excess of $350 for any calendar month after June 30, 1954:

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 5¾ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. 53 Stat. 179, amended July 31, 1946, c. 709, Sec. 3(a); 60 Stat. 723; Aug. 31, 1954, c. 1164, Pt. II, Sec. 201, 68 Stat. 1040."

26 U. S. C. 1520:

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation, paid by such employer after December 31, 1946, for services rendered to him after December 31, 1936, as is, with respect to any employee for any calendar month before July 1, 1954, not in excess of $300 and for any calendar month after June 30, 1954, not in excess of $350.: * * *

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 5¾ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. 53 Stat. 180, amended July 31, 1946, c. 709, Sec. 3(d), 60 Stat. 724; Aug. 31, 1954, c. 1164, Pt. II, Sec. 204, 68 Stat. 1040."

APPENDIX B

Judgments and Opinions of Courts Below

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION.

T. E. GOODIN, SR., et al Vs. CLINCHFIELD RAILROAD COMPANY, BLUE RIDGE LODGE No. 816 OF BROTHERHOOD OF RAILROAD TRAINMEN, et al	Suggested: CIVIL ACTION No. 891

FINAL DECREE

The above entitled cause came on for trial before the Court on the 5th day of October, 1954, on the separate motions of the defendant, Clinchfield Railroad Company and Blue Ridge Lodge No. 816 of

Brotherhood of Railroad Trainmen, for judgment on the pleadings, said motions having been treated by the Court as motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and having been presented to the Court upon the original complaint as amended, the separate answers of the defendant, Clinchfield Railroad Company and Blue Ridge Lodge No. 816 of Brotherhood of Railroad Trainmen, the individual defendants, the motions of the defendants as aforesaid, the testimony introduced upon the trial of this cause, and the briefs and arguments of stated in Memorandum Opinion previously filed therefore.

counsel for plaintiffs and defendants, and the Court being fully advised in the premises finds that there is no genuine issue as to any material fact; that the question presented is one of law, and that defendants are entitled to judgment as a matter of law; for reasons

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the separate motions for judgment heretofore filed by the defendants, as aforesaid, be and the same hereby are granted, and that the complaint as amended herein be and the same is hereby dismissed.

It is further ordered that the costs of this cause be taxed against plaintiffs, for which execution may issue.

Dated this 10th day of November, 1954.

(S) ROBERT L. TAYLOR,
United States District Judge

Entered and filed November 10th, 1954; Byron Pope, Clerk U. S. District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION.

T. E. GOODIN, SR., et al
Vs.
CLINCHFIELD RAILROAD COMPANY, BLUE RIDGE LODGE No. 816 OF BROTHERHOOD OF RAILROAD TRAINMEN, et al

CIVIL ACTION No. 891

OPINION

This is a suit by five employees of the Clinchfield Railroad Company, a railroad operated by Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, under lease, against said railroad and Blue Ridge Lodge No. 816 of Brotherhood of Railroad Trainmen, a labor organization authorized to act as the exclusive bargaining agent of the employees of the Railroad Company under the Railway Labor Act, certain officials of the Labor Union, and a number of individuals who are members of the Union. Each plaintiff is seventy years of age, or older. Since the filing of the suit, plaintiff Prince has retired from the railroad service and is no longer an active party in the suit.

For convenience, Clinchfield Railroad Company will sometimes be referred to hereafter as the Railroad, Blue Ridge Lodge No. 816 of Brotherhood of Railroad Trainmen as the Union, and plaintiffs as Employees.

The Railroad and the Union amended their ex-

isting collective bargaining contract entered into pursuant to the terms of the Railway Labor Act as amended, 45 U.S.C.A., Sec. 151, et seq., by providing for the compulsory retirement of any employee covered by such contract upon attaining the age of seventy. This amendment was executed by the parties on February 1, 1954.

The Employees ask for a declaratory judgment that the compulsory retirement provision of the February 1, 1954 amendment to the bargaining agreement is illegal, void and unenforceable. The amendment to the complaint prays that an injunction issue against the defendant restraining the execution of the compulsory retirement provision.

The suit was filed under the Declaratory Judgment Act, 28 U.S.C., Sec. 201. Jurisdiction of this court was based on the Railway Labor Act, 45 U.S.C.A., Sec. 151, et seq., also Title 28, U. S. C., Sec. 337, which gives the district courts jurisdiction when the matter exceeds three thousand dollars and arises under the constitution, laws or treaties of the United States, and Title 28, U.S.C., Sec. 1337, which gives district courts jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce.

An agreed order was entered in the case on March 22, 1954, restraining the defendants from changing the status quo of any of the plaintiffs as same existed at the time of the commencement of the suit as a result of the agreement between the Railroad and the Union dated February 1, 1954, until the entry of a judgment in the case.

Plaintiffs in their complaint as amended contend that the compulsory retirement provision in the

amended agreement is invalid for a number of reasons. The reasons assigned for the alleged invalidity of the contract are set forth in detail in the complaint as amended and will be referred to later.

The Railroad Company and the Union in their separate answers assert that the compulsory retirement provision was made in good faith after extended negotiations between the Railroad and the Union, and that it is a valid provision. The Railroad and the Union have filed motions for summary judgment, asserting in each motion that the complaint as amended fails to state a claim upon which relief can be granted.

At the request of plaintiffs, a hearing was recently held on the motion for summary judgment, at which time plaintiffs Goodin, Norris and Fink testified orally in support of the factual allegations of the complaint as amended. Also, Mr. Goforth, Secretary of the Union, testified after being called by plaintiffs' counsel for cross-examination. A number of stipulations were made by the parties during the hearing so that there is no dispute between the parties on any material fact necessary to a decision on the motions. The determinative question is a legal one, namely, whether the Railroad and the Union had the legal right to amend their bargaining agreement made pursuant to the Railway Labor Act so as to provide for compulsory retirement of all their conductors and trainmen who reached the age of seventy years.

The pleadings, stipulations, and oral proof, insofar as material to a decision on the motions, present the following facts: The main offices of the defendant are located in the town of Erwin, Tennessee, where plaintiffs live. The defendant Railroad was formed in 1923,

and has continued to exist as a partnership or union of interests consisting of Atlantic Coast Line Railroad Company, a Virginia corporation, and Louisville and Nashville Railroad Company, a Kentucky corporation, for the purpose of and engaged in leasing as lessee from Carolina, Clinchfield and Ohio Railroad Company, a Virginia and South Carolina corporation, as owner and lessor, and operates from Elkhorn City, Kentucky, to Spartanburg, South Carolina, through the states of Kentucky, Virginia, Tennessee, North and South Carolina. The Railroad was constructed about the year 1906 by Carolina, Clinchfield and Ohio Railroad Company, and by it operated until it was leased to the defendant, Clinchfield Company, who in 1923 leased it under long term lease to the Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company. The first bargaining agreements were made by defendants' predecessors in 1910. Other collective bargaining agreements were made in 1922 and 1948. A practice was established under these agreements not to discharge without cause any conductor or trainman so long as he was able to work. Plaintiffs say that they have relied upon this practice throughout the period of their long service with the Railroad. On February 14, 1953, the Union first discussed a compulsory retirement provision.

There are approximately forty-three active conductors and one hundred five active trainmen who are members of the defendant Union. Approximately forty-three members of the defendant Union are either retired or furloughed. Plaintiff Taylor is the only member of the defendant Union. He, along with the other three plaintiffs, are also members of the Order of the Railroad Conductors Union. The compulsory re-

tirement provision was first discussed by the members of the defendant Union on February 14, 1953, at which time members of the other lodges were present, including trainmen and conductors of the Southern Railway Company. The Union has two meetings each month and the compulsory retirement question was discussed at each meeting until October 9, 1953, at which time it was voted to issue to its members ballots on the question of whether or not the members desired to enter into an agreement with the Railroad setting up a compulsory retirement age of seventy. At this time ballots were issued to the non-members of the Union but their votes were not counted. They were considered by the Union as advisory only. On November 2, each plaintiff wrote a letter to the Railroad stating in substance that he considered the action of the Union to retire all conductors and trainmen at age seventy as arbitrary and illegal. The letters also stated that there were no restrictions upon the terms of employment except capability and physical condition. The non-members stated that they would not agree to the compulsory provision. Plaintiff Taylor also joined in this protest. A majority of the votes cast in the October referendum favored the establishment of a compulsory retirement agreement. On November 27, 1953, the defendant Union issued ballots in a second election to close December 1, 1953, upon the compulsory retirement proposition. These ballots were also issued to the non-members of the Union whose votes were counted. On November 27, 1953, plaintiffs, through their counsel, wrote Mr. Goforth, secretary of the defendant Union, that any attempted execution by the Union and the Railroad of the compulsory retirement provision would be illegal for the reasons set forth in

the letter. Plaintiffs in this letter protested a vote on the question and stated in substance that they were not waiving any of their rights to challenge the action of the Union and the Railroad on permitting a referendum on the proposed compulsory retirement agreement. The election was held and a substantial majority of the votes cast were in favor of the compulsory retirement provision. Following the election meetings were held between the representatives of the Union and representatives of the Railroad which resulted in the conclusion of an agreement on February 1, 1954, that established compulsory retirement for all employees represented by the Brotherhood of Railroad Trainmen and in the employ of the Railroad Company at age seventy.

The question for decision is whether the compulsory retirement agreement between the Union and the Railroad is valid. Plaintiffs contend that the compulsory retirement agreement is invalid because the Railway Labor Act does not confer upon the Union as a statutory representative of the Employees and the Railroad the right to make a compulsory retirement agreement. The identical question was decided adversely to the contention of plaintiffs by District Judge William J. Campbell on December 11, 1951, in an unpublished opinion, a copy of which was filed as Exhibit "A" to the Union's brief, in the case of Boget et al vs. Chicago and North Western Railroad Company; Chicago and North Western Railroad Company, counterclaimant and third-party plaintiff vs. Boget et al counterdefendants, and Brotherhood of Locomotive Engineers, third-party defendants, No. 51 C 902 (U. S. District Court, Northern District Illinois, Eastern Division), the pertinent portion of which is as follows:

"I will now pass to the second question presented by the pending motions:

" 'Does the Railroad Labor Act authorize a collective bargaining agreement fixing a compulsory retirement age?"

"Section 2 First of the Railway Labor Act states: 'It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . '

"Section 2 Fourth provides: 'Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter . . .'

"The Railway Labor Act does not, by its terms, define the permissive scope of bargaining agreements except by the use of the phrase, 'rates of pay, rules, and working conditions.' It becomes necessary, therefore, to determine whether an agreement for a compulsory retirement age falls within the purview of any one of such terms. A similar problem confronted the Court of Appeals of this Circuit in the case of Inland Steel Co. vs. N.L.R.B., 170 Fed. 2nd, 247, decided in 1949, in which a certiorari was denied by the Supreme Court, 336 U. S. 960. The Court of Appeals there upheld a decision of the National Labor Relations Board, requiring an employer subject to the National Labor Relations Act to bargain collectively with respect to retirement age.

"The Court stated:

" 'We are unable to differentiate between the conceded right of a union to bargain concerning a dis-

charge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case, the effect upon the 'conditions' of the person's employment is that the employment is terminated, and we think, in either case, the affected employee is entitled under the Act to bargain collectively through his duly selected representative, concerning such termination . . . The Company's position that the age of retirement is not a matter for bargaining leads to the incongruous result that a proper bargaining matter is presented if an employee is suddenly discharged on the day before he reaches the age of 65, but the next day, when he is subject to compulsory retirement, his union is without right to bargain concerning such retirement.

' . . . a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic, reason or common sense . . .

'The Company also concedes that seniority is a proper matter for collective bargaining . . . What would be the purpose of protecting senior employees against lay-off when an employer could arbitrarily and unilaterally place the compulsory retirement age at any level which might suit its purpose? . . . Again we note that discharges and seniority rights, like a retirement and pension plan, are specifically mentioned in the bargaining requirements of the Act.'

"The reasoning of the Court of Appeals in the Inland Steel case compels the conclusion that compulsory retirement is a proper subject for collective bar-

gaining under the Railway Labor Act. That Act and the National Labor Relations Act both have a long history of identical construction in the matters protecting the right to organize and bargain collectively. The United States Supreme Court frequently refers to cases under the two Acts interchangeably, and relies on cases under one Act for construction of the other.

"It should be further remembered that unless the plaintiffs rely on a collective bargaining agreement for their tenure of employment, they would have no standing to sue in any instance, for the reason that the employer could discharge them at all."

Plaintiffs' contention that the compulsory retirement agreement is discriminatory as to the minority group of the Railroad employees, particularly as to plaintiffs, was also decided adversely to their contention by Judge Campbell in his opinion in the above referred to Boget case, the pertinent portion of which is as follows:

"We now come to the third question at issue.

"Is a collective bargaining agreement, wherein a compulsory retirement age is fixed, discriminatory?

"What has been said in the paragraphs disposing of the preceding issue, should adequately dispose of this issue. However, in addition, it should be noted that compulsory retirement is not discriminatory in the sense that it affects only certain employees and not others. The compulsory retirement age of seventy years affects all employees alike in its ultimate results, since all employees, who live and remain with the carrier long enough, will some day reach the retirement age and will be obliged to leave their employment. True, some will feel its effectiveness immedi-

ately, whereas others will not feel its touch until some future, but ascertainable, time. That fact, however, does not militate against its present universal applicability."

The question was made by the employees in the Boget case that the Railroad Retirement Act prohibited or limited the right of the Railroad and the Union to fix a compulsory retirement age. Plaintiffs have not made this question in the present suit. The portion of the opinion in the Boget case dealing with his question is as follows:

"Passing to the fourth and final question at issue.

" 'Does the Railroad Retirement Act prohibit or limit the right of a carrier and a collective bargaining representative to fix a compulsory retirement age?'

"The Railroad Retirement Age does not purport to establish the age at which employees shall or may retire. Plaintiffs predicate their instant action primarily upon Section 2 (c) of the Act, which provides:

" 'An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the individual entitled thereto), but—

"(1) Not before the date following the last day of compensated service of the applicant, and

"(2) Not more than sixty days before the filing of the application.'

"The Retirement Act is clearly limited to the subject of the terms and conditions under which an employee shall be entitled to an annuity. The Act merely fixes the age sixty-five as the age at which a male employee becomes entitled to an annuity, assuming he meets the other qualifications. The Act encourages

retirement at the age of sixty-five, for it prevents an employee from using, in computing the amount of his annuity, any service rendered 'after the end of the calendar year in which the individual attains the age of sixty-five.'

"Sec. (3b) (4). The Section relied upon by plaintiffs does not cover an 'application for retirement' or establish any single method of accomplishing retirement. It simply provides that one of the conditions of getting an annuity is signing a written application for an annuity in a manner and form as prescribed by the Railroad Retirement Board."

In the court's opinion, the reasoning of Judge Campbell in the Boget case is sound and the conclusions drawn by him are acceptable as decisive of the principal issues in this case.

Plaintiffs contend that Congress is without power to authorize bargaining agreements between representatives of Employees and the Railroad containing compulsory retirement provisions. It has been held that authorization for collective bargaining is within congressional power under the commerce clause. Accordingly, authorization of collective bargaining agreements is constitutional. Virginian Railway Company vs. System Federation No. 40, 300 U. S. 515. However, the bargaining agreement itself must not be used as a weapon against minorities so as to deprive them of civil or constitutional rights. Wallace Corporation vs. N.L.R.B., 323 U. S. 248; Steele vs. Louisville and Nashville Railroad Company, 323 U. S. 192.

No individual has a constitutional right to be employed by another. Individuals may enter into a contract of employment, and if they do so, contract rights arise which have some constitutional protection. But

there is no constitutional prohibition against the breaking of a contract, and if one is broken the aggrieved party has his cause of action for damages. In employment relations it would be an action for wrongful discharge. Plaintiffs have no contractual or vested right to be employed by the Railroad. If they had individual contracts of employment and were wrongfully discharged by the defendant Railroad they could have sued for wrongful discharge, but they are not suing for wrongful discharge. The record indicates that they do not have individual contracts with the defendant Railroad, as will more fully appear hereafter. What contract rights plaintiffs have are based on the collective agreement with the company and will continue so long as the collective agreement is in force. If the collective agreement falls the right falls with it. There is no constitutional right to have particular employment relations perpetuated through perpetual renewals of the collective agreement.

If the collective agreement between the Union and the Railroad is invalid for any or all of the asserted reasons, it falls and plaintiffs Union or collective security falls with it. If the Railroad through Union contract surrenders its right to terminate plaintiffs' employment at an age of its own choosing and accepts seventy as the termination age, this is no more than an implied agreement by the Railroad to continue the employment of conductors and trainmen until they reach seventy before terminating because of age. Without the contract the employer could terminate them at any time. A collective bargaining agreement upon age seventy as the termination age is not an abridgment of any right of the employees but only an abridgment of the employer's right.

If the collective bargaining agreement in this case was devised as a means of penalizing them individually because of their individual or group activities it would be an unlawful discrimination. Wallace Corporation vs. N.L.R.B., 323 U. S. 248. This, however, is not the situation. Plaintiffs rely mainly on denial or abrogation of their seniority rights as the basis for alleging invalidity of the collective agreement. Seniority, as affecting promotions, lay-offs, and similar eventualities, does not arise from statutes or constitutional mandate, but has its origin in collective bargaining itself. No vested right, therefore, exists in perpetuation of seniority rules. As they arise from collective bargaining, they can be modified by collective bargaining. Ford Motor Company vs. Huffman, et al, 345 U. S. 330; Lewellyn vs. Fleming, 154 F. 2d 211; Elder vs. New York Central Railway Company, 6 Cir., 152 F. 2d 361.

Modification, as is true of original bargaining, may not be used as a weapon of punishment or of depriving employees of their civil or constitutional rights. Rolax vs. Atlantic Coast Line Railway Company, 4 Cir., 186 F. 2d 473.

Modification of seniority rules is not invalid though its effect is involuntary retirement of employees at an age fixed by collective bargaining. Inland Steel Co. vs. N.L.R.B., 7 Cir., 170 F. 2d 247; certiorari denied, 336 U. S., 960.

Plaintiffs in support of their contention that Congress does not have the power under the constitution to authorize employees and railroads to enforce agreements providing for compulsory retirement at certain ages cite the case of Railroad Retirement Board *et al* v. Alton Railroad Company, *et al,* 295 U. S. 330.

In that case the court held that the act establishing a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act was violative of the due process clause of the Fifth Amendment in that, among other things, it undertook to take the private property of some of the carriers and transfer it to others without compensation, where the object of the transfer was to build up the transferee or to pension its employees. Numerous other reasons were stated by the court why the Act violated the due process clause. That case is not controlling of the present case.

Another constitutional objection offered to the Act by the plaintiffs is that it has delegated to the Labor Union the power to enforce compulsory retirement on adults solely because of age without establishing any standard or test to be followed by the Labor Union in the exercise of this power. As heretofore indicated, Section 2 of the Railway Labor Act makes it the duty of the railroad and employees to make and maintain agreements regarding "rates of pay, rules, and working conditions." The main purpose of the Act is to have the railroads and employees to settle all of the disputes in order to avoid any interruption to commerce growing out of any dispute. It was for Congress to choose the means by which its objective of securing the uninterrupted service of United States railroads was to be secured, and its judgment expressed in the Railway Labor Act is not open to review in the courts. Virginian Railway Company vs. System Federation No. 40, 300 U. S. 515. In Ford Motor Company vs. Huffman, 345 U. S. 330, the court said:

"Variations acceptable in the discretion of bargaining representatives, however, may well include

differences based upon such matters as the unit within which seniority is to be computed, the privilege as to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees."

The railroad industry is vitally concerned with the safety of the public. The court is unable to say that the retirement provision of seventy years is not directly related to the safety of the public.

Plaintiffs also contend that the compulsory retirement agreement violates the attainder clause, Article I, Section 9, Clause 3, of the Constitution, which provides "no bill of attainder or ex post facto law shall be passed." Another constitutional objection is that it denies plaintiffs due process in violation of the Fifth Amendment, which provides in part: "No person shall be deprived of life, liberty or property, without due process of law." As heretofore observed, plaintiffs have no property right in continued employment, except as derived from contract, in this case contract meaning the collective bargaining agreement, which further means that they have no property right at all, hence due process is not involved.

Plaintiff Goodin claims that he has a private contract with the defendant Railroad which was made in 1908. At that time one of the predecessors of defendant Railroad was the South and Western Railroad Company. Mr. Cables was the Vice-President and General Manager of South and Western Railroad. He left in 1912. In 1908, plaintiff Goodin met Mr. Cables while Goodin was conductor on a work train. The railroad was laying track at that time. Goodin was second in seniority. Cables brought over a man by the name of Wiley from another railroad as conductor and made

him second in seniority. A man by the name of Hall came over and circulated a petition to make himself third in seniority. Goodin testified that at that time he asked Cables if he was going to bring additional men over from other railroads and make them his senior. Cables told him that he was the third man in seniority and that he would remain third in seniority. This is the basis of the claim of plaintiff Goodin that he has an individual contract with the Railroad to continue his work in perpetuity so long as he is capable of performing the duties of conductor. Plaintiff Goodin and the other three plaintiffs also claim that it has been the custom of the Railroad Company throughout the years that it would not discharge anyone without a hearing and without cause so long as he was able to perform the duties as an employee. The record shows, however, that this custom stemmed from the bargaining agreements which have been in effect since the first bargaining agreement was made with the Union in 1910.

There is no proof in the record that Cables had authority from the Board of Directors of the Railroad Company to enter into the contract that plaintiff Goodin claims he entered into with him in 1908.

As construed and applied by the courts, collective bargaining under the Railway Labor Act and similar acts supersedes individual contracts between employers and employees. Order of Railroad Telegraphers vs. Railway Express Agency, Inc., 321 U. S. 342; J. I. Case Co. vs. N.L.R.B., 321 U. S. 332.

Any practice or custom practiced by the railroad in the past to not discharge any employee without a hearing and without cause could have been changed by a valid bargaining agreement between the Rail-

road and the bargaining agency under the Railway Labor Act, which was done by the agreement of February 1, 1954.

We now revert to the contention of plaintiffs that the agreement violates the attainder clause of the constitution. In Garner vs. Los Angeles Board, 341 U. S. 716, at 722, the court said:

"Bills of attainder are 'legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. 'United States vs. Lovett, 328, U. S. 303, 315 (1946). Punishment is a prerequisite. See concurring opinion in Lovett, *supra*, at 318, 324. Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.' Cummings vs. Missouri, 4 Wall. 277, 320 (1867). We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.

"Cummings vs Missouri, 4 Wall. 277 (1867), and Ex parte Garland, 4 Wall. 333 (1867), the leading cases in this court applying the federal constitutional prohibitions against bills of attainder, recognize that the guarantees against such legislation were not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the court said in Garland's case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive juris-

diction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall, at 379-380. See also, Cummings vs. Missouri, supra, at 318-319. This doctrine was reaffirmed in Dent vs. West Virginia, 129 U. S. 114 (1889), in which Mr. Justice Field, who had written the Cummings and Garland opinions, wrote for a unanimous court upholding a statute elevating standards of qualifications to practice medicine. And in Hawker vs. New York, 170 U. S. 189 (1898), the court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony. Both Dent and Hawker distinguished the Cummings and Garland cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it."

The Court observed in the Lovett case (328 U. S. 303), the statute "did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees." The statute there "was held to have imposed penalties without judicial trial."

Frankfurther, J., concurring in part and dissenting in part, said:

"The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs . . . "

Quotations above related to an ordinance which operated to exclude Communists from City jobs. In Communications Assn. vs. Douds, 339 U. S. 382, the court in upholding the Communist-oath provision

(sec. 9h) of the National Labor Relations Act said at page 413:

"The unions' argument as to bill of attainder cites the familiar cases, United States vs. Lovett, 328 U. S. 303, (1946); Ex parte Garland, 4 Wall. 333 (1867); Cummings vs. Missouri, 4 Wall. 277 (1867). Those cases and this also according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct . . . Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit.

We cannot conclude that this section is a bill of attainder."

United States vs. Lovett, 328 U. S. 303, held to be a bill of attainder, hence unconstitutional, an act of congress which cut off the compensation of three named individuals, congress having found them guilty of disloyal conduct. At page 315 the court said:

"In Cummings v. Missouri, 4 Wall. 277, this Court said, 'A bill of attainder is a legislative act which inflicts punishment without a judicial trial . . . Neither of these cases (Cummings and *ex parte* Garland) has ever been overruled. They stand for the proposition that legislative acts, no matter what their form that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict

punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Sec. 304. We do adhere to it.

"Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned, it 'operates as a legislative decree of perpetual exclusion' from a chosen vocation. Ex parte Garland, supra, at 377. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U. S. C. 2; acceptance of bribes by members of Congress, 18 U.S.C. 199, 202, 203; or by other government officials, 18 U.S.C. 207; and interference with elections by Army and Navy officers, 18 U.S.C. 58.

"Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal."

It is not alleged here that the Railway Labor Act contravenes the attainder clause, but that the violation is in the collective agreement. The foregoing quotations on the subject of attainder indicate conclusively that attainder applies to punishment. In order to sustain their attainder argument, plaintiffs would have to show that the collective agreement was designed to operate against them as named persons, or as persons easily ascertainable and intended to be

penalized. That, however, is not the ground on which they advance the attainder contention, but on the ground that the company and the Union have entered into a collective agreement by which they have adopted the age of seventy as the age of compulsory retirement. For all that appears, it is a provision that will apply to every conductor of the railroad when and if he reaches the age of seventy. By any of the tests above defined and discussed by the Supreme Court, that sort of contract provision is not a bill of attainder.

Plaintiffs further contend that the Union violated the duty owed to them as their bargaining agent to represent them as members of a minority group of employees in a fair, impartial, and good faith manner. In support of this contention plaintiffs say that the Union failed to invite them to their meetings and to hear their views on the question of compulsory retirement. It is true that plaintiffs were not invited to the Union meetings to discuss compulsory retirement provisions.

In the case of Steele vs. Louisville and Nashville Railroad Company, 323 U. S. 192, the court, after stating the duties of a bargaining agent to represent the minority group in good faith, further stated that wherever necessary to that end the Union is required to consider requests of non-union members and the expression of their views with respect to the subject of collective bargaining and to give them notice of or opportunity for hearing on its proposed action.

The record shows that plaintiffs knew as early as February, 1953 that the question of compulsory retirement was being considered by the Union. During the period thereafter until the second vote was taken it was a subject of constant discussion among em-

ployees on the streets. Plaintiffs made known by letters their protests to the Railroad before the first vote was taken. They again protested to the Union by leted letter sets forth the reasons why plaintiffs felt that ter through able counsellor. This previously mentioncompulsory retirement was illegal. The reason set forth in that letter are practically the same reasons relied upon in the bill of complaint as amended as reasons why the court should declare the agreement invalid, except plaintiffs did not claim that they were entitled to appear in the meetings of the Union to express their views in opposition to the compulsory retirement provision. Plaintiff Taylor had that right as a member of the Union.

The court concludes that failure to invite plaintiffs to a meeting of the Union to express their views does not invalidate the bargaining agreement.

The court further concludes that the Union acted fairly and in good faith in entering into the bargaining agreement with the Railroad on February 1, 1954.

Let an order be submitted sustaining the motion for summary judgments dismissing the case.

ROBERT L. TAYLOR
U. S. District Judge.

Filed October 21, 1954, Byron Pope, Clerk U. S. District Court.

No. 12,437

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

T. E. GOODIN, SR., et al,
Appellants,
v.
CLINCHFIELD RAILROAD COMPANY, et al.,
Appellees.

ORDER

(Filed Nov. 22, 1955)

Before SIMONS, *Chief Judge,* and STEWART, *Circuit Judge.*

Upon consideration of appellants' motion to substitute Clinchfield Division Number 545, Order of Railway Conductors and Brakemen as appellee in lieu of certain present appellees and of the responses thereto;

IT IS ORDERED that consideration of said motion be and it hereby is deferred to the hearing of this cause upon the merits on December 7, 1955;

AND IT IS FURTHER ORDERED that Clinchfield Division Number 545, Order of Railway Conductors and Brakemen be and it hereby is granted leave to file four typewritten copies of a brief on or before December 5, 1955, and to be heard on December 7, 1955, if it so desires.

Approved for entry:

(s) POTTER STEWART
United States Circuit Judge

No. 12,437

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

T. E. GOODIN, SR., et al,

Appellants,

v.

CLINCHFIELD RAILROAD COMPANY, et al.,

Appellees

CAUSE ARGUED AND SUBMITTED

This cause is argued by John D. Goodin and Ferdinand Powell, Jr. for Appellants by John S. McLellan and Harry Dennis Erwin for Appellees and is submitted to the court.

December 7, 1955 — Before: McAllister, Miller and Stewart, *Circuit Judges.*

JUDGMENT

(Filed February 10, 1956)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be and the same is hereby affirmed.

No. 12,437

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

T. E. GOODIN, SR., et al,
Appellants,
v.
CLINCHFIELD RAILROAD COMPANY, et al.,
Appellees.

OPINION

Filed February 10, 1956 Carl W. Reuss, Clerk
Decided February 10, 1956

Before McAllister, Miller and Stewart, Circuit Judges.

PER CURIAM. The appellants, who are conductors in the employ of the appellee, Clinchfield Railroad Company, and are seventy years of age or older, sought by this action to enjoin the Railroad Company from putting into effect a provision of the existing collective bargaining contract entered into between it and the co-appellee Blue Ridge Lodge No. 816 of Railroad Trainmen, which was the designated collective bargaining representative under the Railway Labor Act, Sec. 151 et seq., Title 45, U. S. Code for all the conductors and trainmen of the Railroad Company. Appellants were members of the Order of Railway Conductors, Clinchfield Division 545, and only one of them belonged to the appellee Union. The provision under attack provided that all conductors and trainmen shall forfeit all seniority and retire from service upon attaining the age of seventy years. They also asked for a declaratory judgment holding said provision illegal and unenforceable.

Following the filing of answers by the Railroad Company and the Union, alleging that the compulsory retirement provision was made in good faith after extended negotiations between the Railroad Company and the Union, and that it was a valid provision, motions were also filed by them for judgment on the pleadings, which were treated by the Court as motions for summary judgment. Following a hearing at which the material facts were established without dispute, the District Judge sustained the motions and entered a decree dismissing the action from which this appeal was taken.

Appellants contend that a provision dealing with compulsory retirement was not a matter for collective bargaining under the Railway Labor Act since it did not involve rates of pay, rules, or working conditions covered by the Act; that the Union exceeded the powers conferred on it by the Act in that it did not deal fairly and in good faith with the rights of those employees who were non-members of the Union or minority Union members; that the contract provision was an arbitrary and unreasonable classification of employees, deprived them of their property without due process of law, and in effect was a bill of attainder in violation of Section 9, Article 1 of the United States Constitution; and that Congress was without power to grant to one of its agencies the right to require compulsory retirement which the Supreme Court had declared unconstitutional in *Railway Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330.

The District Judge in a comprehensive and well reasoned opinion discussed in detail the contentions of appellants and rejected them, citing numerous authorities in support of his ruling. *Goodin* v. *Clinchfield Rail-*

road Co., 125 F. Supp. 441. For the reasons stated therein we are of the opinion that the judgment should be affirmed. See also the following cases which have been handed down since the case was denied by the District Judge: *McMullans* v. *Kansas, Oklahoma & Gulf R. W. Company*, . . . F. (2d) . . , C. A. 10th; Jan. 10, 1956; *Lamon* v. *Georgia Southern & Florida Railway co.*, , , *Ga.* . . , November 14, 1955; *U. S. Steel Corporation v. Nichols*, . . . F. (2d) . . , C. A. 6th; Jan. 25, 1956.

Judgment affirmed.

No. 12,437

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

T. E. GOODIN, SR., et al,

Appellants,

v.

CLINCHFIELD RAILROAD COMPANY, et al.,

Appellees.

ORDER DENYING REHEARING

(Filed March 26, 1956)

Appellant's petition for rehearing having been considered by the Court;

IT IS ORDERED that said petition be denied.

MAY 11 1956

In the Supreme Court of the United States

October Term, 1955

No. 900

T. E. GOODIN, SR., *Petitioner*

vs.

CLINCHFIELD RAILROAD COMPANY, BLUE RIDGE LODGE NO. 816 OF BROTHERHOOD OF RAILROAD TRAINMEN, GRADY BRIGGS, RODDY L. STEWART, J. O. GOFORTH, STEVE TOLBERT, JAKE E. WEBB, EDWARD H. TAYLOR, PAUL BOOHER, HARRY HOLLIFIELD, H. CLAY HOWARD, C. C. SLAGLE, J. L. MASTERS, FLOYD D. SPARKS, W. D. SLAGLE, SR., AND JAMES GODSEY, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: May 7, 1956.

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In the Supreme Court of the United States

October Term, 1955

No. 900

T. E. GOODIN, SR., *Petitioner*

vs.

CLINCHFIELD RAILROAD COMPANY, BLUE RIDGE LODGE NO. 816 OF BROTHERHOOD OF RAILROAD TRAINMEN, GRADY BRIGGS, RODDY L. STEWART, J. O. GOFORTH, STEVE TOLBERT, JAKE E. WEBB, EDWARD H. TAYLOR, PAUL BOOHER, HARRY HOLLIFIELD, H. CLAY HOWARD, C. C. SLAGLE, J. L. MASTERS, FLOYD D. SPARKS, W. D. SLAGLE, SR., AND JAMES GODSEY, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Every question presented by the petition for a writ of certiorari filed herein was considered and disposed of adversely to Petitioner's several insistencies in *McMullans v. Kansas, Oklahoma & Gulf Railway Co., et al.* 229 F.2d 50 (C.C.A. 10), cert. den. April 30, 1956, No. 759, —— U.S. ——.

In this suit Petitioner, T. E. Goodin, Sr., likewise challenges the validity of an amendment to an existing collective bargaining

contract effected following negotiation between Respondents, Blue Ridge Lodge No. 816 of Brotherhood of Railroad Trainmen (herein called the Union) and Clinchfield Railroad Company (sometimes referred to herein as the "Carrier") providing for the retirement of all employees in the class represented by the Union for collective bargaining purposes, upon attainment of age seventy.

It would seem material to review the events preceding the consummation of the contract provision under attack.

Discussions among members of the Union, with respect to the propriety of seeking to include in its collective bargaining agreement with the Carrier a compulsory retirement agreement, had begun as early as January, 1953 (29a). In February of 1953, a meeting of the Union was held, to which representatives of a labor organization engaged in representing certain classes of employees on the Southern Railroad were invited for the purpose of obtaining the benefit of the viewpoint of such labor organization on the subject of compulsory retirement, in the light of the experiences had by such labor organization and its members under the compulsory retirement plan then in effect on the Southern Railroad (29a). At this meeting the Union deemed it appropriate to postpone action on the compulsory retirement subject for a period of sixty days in order to insure full and mature consideration of this problem by all of its members and the class of employees it represented. Not content with this period of discussion, the Union undertook to obtain a formal expression of viewpoint from the class of employees it represented upon the subject of compulsory retirement by causing to be spread a referendum. All members of the Union were issued ballots, as were non-members, including Petitioner. Petitioner voted along with the members of the Union, but his vote (and that of other non-members) was treated as advisory and, while counted, was not tabulated (aa 2, 3). The tabulation of votes cast in the foregoing October referen-

dum indicated an overwhelming sentiment in favor of the negotiation of a compulsory retirement agreement (a38). It was only following this referendum that the Union served written notice, pursuant to the Railway Labor Act (45 U.S.C.A. Sec. 151, et seq.) upon the Carrier of its desire to confer and bargain upon the subject of compulsory retirement, with a view to incorporating by way of amendment to the existing collective contract, a provision requiring retirement at a predetermined age.

During this entire period the topic of compulsory retirement was "discussed generally between all crafts of the employees of the Railroad Company" and was a "prime topic of conversation." (aa 2). In view of the evident interest in the proposed negotiation for a compulsory retirement plan, the Union decided to obtain the fullest possible expression from the employees it represented, and accordingly cause a second referendum to be spread in November, 1953, in which ballots were issued to every employee represented by the Union, whether a member or not, upon the proposition of establishing a compulsory retirement age of seventy years (31a). Said ballot was issued to Petitioner, who, along with members of the Union, voted in said referendum. The result of the November referendum conformed to the results of the prior balloting and disclosed the unwavering approval of the great majority of the employees represented by the Union of the proposed compulsory retirement plan. Subsequently, negotiations were begun between the Union and the Carrier, which culminated on February 1, 1954, in an amendment to the existing collective bargaining contract, requiring retirement at age seventy (32a, 33a). During the interval between the October and November referenda Petitioner and his co-plaintiff below, under dates of November 2, 1953, and November 27, 1953, (77a, 81a), respectively, advised Respondents, through counsel, that they deemed the proposed collective bargaining action arbitrary and illegal, and, following consummation of the compulsory retirement amendment to the

contract here involved, instituted suit in the United States District Court for the Eastern District of Tennessee, asserting the invalidity and illegality of such agreement upon a number of theories dealt with in the reported opinion of the District Court at 125 F.Supp. 441. It is, however, fair to say that the three principal objections urged by Petitioner to the compulsory retirement agreement were:

1. That compulsory retirement was not an appropriate subject for collective bargaining under the Railway Labor Act (45 U.S.C.A. Sec. 151, et seq).

2. That the Railroad Retirement Act (45 U.S.C.A. 228(b)) had preempted the field of retirement in the railroad industry and excluded the right of private parties to contract with respect to any facet of retirement.

3. That the Union had breached its statutory duty to Petitioner and his co-plaintiffs below by acting in bad faith, in that the Union had failed to accord the complaining employees it represented fair and impartial representation.

The case came on before the District Court following Answers to the Complaint, Motions for Judgment on the Pleadings (which were converted by the District Court to Motions for Summary Judgment), and after trial on the merits, following which the District Judge, in a comprehensive opinion, considered in detail Petitioner's objections to the compulsory retirement agreement, and rejected each and every one of them upon the application of settled legal principles or upon a finding of failure of proof by Petitioner and his co-plaintiffs below, and indeed upon an affirmative finding that the evidence was against the insistences of Plaintiffs below and Petitioner here. Upon appeal to the United States Court of Appeals for the Sixth Circuit, that Court in a *Per Curiam* opinion reported at 229 F.2d 579, in effect adopted the District Court's opinion.

ARGUMENT

POINT 1.

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS CORRECTLY APPLIED APPLICABLE DECISIONS OF THIS COURT AND IS IN UNQUALIFIED ACCORD WITH THE UNIFORM JUDICIAL VIEW THAT A COMPULSORY RETIREMENT AGREEMENT, FIXING A REASONABLE RETIREMENT AGE OF SEVENTY YEARS, IS VALID WHEN NEGOTIATED IN GOOD FAITH BY A UNION FUNCTIONING AS THE EXCLUSIVE BARGAINING REPRESENTATIVE FOR A CLASS OF A CARRIER'S EMPLOYEES

A. *Compulsory Retirement Is An Appropriate Subject For Collective Bargaining Under The Railway Labor Act*

The Railway Labor Act, 45 U.S.C.A. 151, et seq., Sec. 52, requires parties subject thereto to bargain with respect to "rates of pay, rules and working conditions" and further requires that every reasonable effort be made to settle all disputes between a carrier and its employees in order to effectuate the primary statutory objective, to-wit: the diminution of labor disputes, the likely effect of which is to impede interstate commerce. It would seem that the statutory terminology *"rates of pay, rules and working conditions,"* coupled with the legislative mandate to parties subject to the Act, to settle "all disputes" would, under the most literal test, require the conclusion that a compulsory retirement agreement is within the bargainable issues contemplated by the Act. It can be said that the frequency with which the retirement issue has presented itself in recent contract negotiations authorizes two observations. First, it is a dispute which, if not settled, could very well lead to the interruptions in commerce the Act was designed to avoid; and second, the establishment of

such a plan plainly creates a "working rule" and, therefore, a "working condition."

In construing the Railway Labor Act, it has not been rare for this Court to employ decisions involving the National Labor Relations Act and to use holdings primarily addressed to one statute interchangeably with problems arising under the other. For example, in *J. I. Case Co. v. N.L.R.B.* 321 U.S. 332, an action involving the National Labor Relations Act, this Court followed decisions in connection with the Railway Labor Act, while in *Order of Railroad Telegraphers vs. Railway Express Agency*, 321 U.S. 342, cases involving the National Labor Relations Act were used in disposing of issues which had arisen under the Railway Labor Act. For, as put in *N.L.R.B. vs. Penna, Greyhound Lines*, 303 U.S. 261, the Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act and declared that the former was "an amplification and further clarification of the principles" of the latter.

Upon this premise we suggest the persuasiveness of *Inland Steel Co. vs.* N.L.R.B. 170 F.2d 247, cert. den.; 336 U.S. 960. The *Inland* case involved the enforcibility of a National Labor Relations Board order directing the employer there involved to bargain with the statutory representative of its employees with respect to a compulsory retirement agreement proposed for insertion in a collective bargaining agreement. In holding compulsory retirement an appropriate subject for collective bargaining under the National Labor Relations Act, 29 U.S.C.A. Sec. 151, the Court noted that "a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic, reason or common sense."

The scope of bargaining under the National Labor Relations Act is determined by the statutory phrase, "rates of pay, wages,

hours of employment or other conditions of employment." The Railway Labor Act's counterpart language is "rates of pay, rules and working conditions." The *Inland* holding was grounded upon the Court's approval of the Labor Board's conclusion that . . . *"the retirement pension plan is included in the 'conditions of employment' and is a matter for collective bargaining."* To equate the Railway Labor Act phrase *"working conditions"* with the National Labor Relations Act term *"conditions of employment,"* is to give effect to the construction the language clearly requires and to effectuate the purpose of the enactment to extend the scope of collective bargaining to every possible subject with respect to which a dispute could legitimately arise between a union and a carrier. In fact, in the *Inland* case, the inclusion of a retirement plan within the statutory terms "conditions of employment" was held to be so clear as to "leave little, if any, room for construction." It is worth noting that the dissenting Judge in the *Inland* case concurred in the majority view that "pension and retirement plans constitute part of the subject matter of compulsory collective bargaining under the Act." See also *N.L.R.B. vs. Jacobs Mfg. Co.* 196 F.2d 680, CCA (2).

The denial by this Court of certiorari in the *Inland* case at 336 U.S. 960, would appear to have put at rest the issue of the inclusion of pension and retirement plans under either the phrase "conditions of employment" or "working conditions."

But if not, then squarely in point upon this issue is *McMullans, et al vs. Kansas, Oklahoma & Gulf Railway Co., et al.* 229 F.2d 50, cert. den. April 30, 1956, —— U.S. ——. There, as here, the Court of Appeals had held valid a collective bargaining agreement providing for the compulsory retirement of railroad engineers upon the attainment of age seventy. This Court's denial of certiorari in the *McMullans* case is decisive of the bargainability of compulsory retirement under the Railway Labor Act, and

indeed, as we have hereinabove suggested, of every other question presented by this Petition. See also:

Boget vs. Chicago & Northwestern Railroad Co., (Northern District of Illinois) No. 51 C 902 (1951) R. aa 13—aa 26);

Lamon vs. Georgia, Southern and Florida Railway Co., 90 S.E. 2d 659 (1955);

Flowers vs. Locomotive Firemen and Enginemen, ——— Ga. ———, 37 LRRM 2434 (1956);

Jones, et al vs. Martin, as Trustee of Florida East Coast Railway Co., etc. (S. Dist. Fla.) No. 6795-M, decided April 16, 1956, ——— F. Supp. ———, 37 LRRM 2839.

All of the foregoing authorities are in accord with the view expressed upon the issues involved in the case at bar by the Court of Appeals, and indeed the view of this Court as implied from the denial of certiorari in both the *McMullans* and *Inland Steel* cases, supra.

B. *There Is No Conflict Of Authority Upon The Validity Of Compulsory Retirement Provisions Of The Type Here Involved*

An examination of the holdings of the several Courts which have considered the asserted infirmities attaching to a negotiated compulsory retirement agreement reveals judicial unanimity that such contracts are valid. Petitioner's insistence that this question has not been but should be settled by this Court is repelled by this Court's denial of certiorari in the *McMullans* and *Inland Steel cases.*

Moreover, Petitioner's notion that the Court of Appeals holding here is in direct conflict with *Railroad Retirement Board vs. Alton Railroad Co.*, 295 U.S. 330, and *Smith vs. Texas*, 233 U.S. 630, will not bear scrutiny. The *Alton* case held unconstitutional

an Act of Congress purporting to require involuntary retirement upon a number of grounds clearly not material to the right of private parties to contract with respect to compulsory retirement. Similarly, the *Smith* case is transparently irrelevant, for there this Court held invalid a Texas statute defining as a misdemeanor the employment of any person as a railway conductor in the absence of two years prior service as a freight conductor or brakeman. And in doing so the Court noted that such legislative intervention operated to deny "to many the liberty of contract . . . and operates to establish rules of promotion *in a private employment.*" The *Alton* case and the *Smith* case may be said to stand as a barrier to Federal and State legislation upon employment issues where there is no rational basis in the public interest for legislative intervention. But neither decision touches upon the contract rights of private parties to establish through the collective bargaining instrument reasonable, nondiscriminatory terms and conditions of employment.

C. *By Enacting The Railway Retirement Act, 45 U.S.C.A. 228(b). Congress Did Not Intend To Exclude Private Parties From Contracting With Respect To Retirement*

Petitioner's view that a collective bargaining contract clause stipulating a compulsory retirement age is invalid under preemption principles by reason of the Railroad Retirement Act, 45 U.S.C.A. 228, overlooks both the purpose of such Act and the result of the compulsory retirement agreement. The Railroad Retirement Act provides for the payment of an annuity to qualified employees who have reached the age of sixty-five and who apply for such annuity. *It does not purport to compel retirement at any age.* And, indeed, the *Alton Railroad Company* case, supra, noted that "these matters obviously lie outside the orbit of Congressional power."

It can, accordingly, be said that the compulsory retirement agreement here involved deals with an entirely different subject in a separate field than that with respect to which the Railroad Retirement Act addresses itself. It cannot be argued with validity that as between the Act and the contract clause any of the applicable preemption criteria, viz. "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment and interference" are applicable. *Hines v. Davidowitz*, 312 U.S. 52, 67. See also *McMullans, et al vs. Kansas, Oklahoma & Gulf Railway Co., et al*, supra, and *Boget vs. Chicago & Northwestern Railroad Co.*, supra.

POINT 2

THE PETITION SHOULD BE DENIED BECAUSE THE RECORD DISCLOSES THAT IN NEGOTIATING THE COMPULSORY RETIREMENT AGREEMENT INVOLVED HERE, THE UNION ACTED FAIRLY, IMPARTIALLY AND IN GOOD FAITH

A. *The "Good Faith" Of The Union Is A Factual Issue Which This Court Will Not Review Upon Certiorari*

It would appear beyond the pale of argument that this Court "is not the place to review a conflict of evidence" and that an issue of "good faith 'can have meaning only in its application to the particular facts of the particular case.'" *N.L.R.B. vs. American National Insurance Co.*, 343 U.S. 395, 410. Despite this well settled rule, Petitioner insists that "bad faith" representation accorded him by the Union operated to vitiate the compulsory retirement agreement. This argument is advanced in order to invoke the rule of *Steele vs. L. & N. Railroad Co.*, 323 U.S. 192, that a labor union, as the statutory representative of a craft, and in making contracts with the carrier, has the duty to "represent non-union or minority union members of the

craft without discrimination, fairly, impartially and in good faith." 323 U.S. at 204. Quite apart from the nonreviewability of this factual issue here is the affirmative finding of fact of the District Court, approved by the Court of Appeals, *"that the Union acted fairly and in good faith in entering into the bargaining agreement with the Railroad on February 1, 1954"* (102a). The "good faith" requirement of the *Steele* case was more than satisfied by the Union as a review of the events preceding the consummation of the compulsory retirement agreement will demonstrate. (See "Statement of the Case," page 3, *supra).*

B. *The Compulsory Retirement Agreement Here Is Not Discriminatory, Despite Any Adverse Effect It Might Have Upon Petitioner*

Our first observation with respect to the asserted discriminatory character of an agreement requiring retirement at age seventy is that such agreement is not discriminatory in point of fact. By its terms it applies to all who are seventy years of age presently or who later attain this age. This view has been sustained by every Court which has considered this question, including this Court, in *McMullans vs. Kansas, Oklahoma & Gulf Railway Co.*, et al., *supra.*

Secondly, while the practical effect of the compulsory retirement agreement may be to immediately displace Petitioner, such fact, standing alone as it does, may not be said to render the contract "discriminatory" in any legal sense. It is settled that "the statutory representative of a craft is not barred from making contracts which may have unfavorable effects on some of the members of the craft represented." *Steele vs. L. & N. Railroad, supra.* This is so if "variations in the terms of the contract" are "based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in

seniority." *Steele vs. L. & N. Railroad, supra.* And among those relevant conditions which have been considered as warranting a contract variation are included differences "based upon such matters . . . *as the fitness, ability or age of the employees.*" *Ford Motor Co. vs. Huffman,* 345 U.S. 330, 339. This is necessarily the rule, since "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford vs. Huffman, supra.* To say that retirement age of employees is not a matter with which both a carrier and a union may concern themselves in collective bargaining negotiations in the railroad industry, is to overlook the very nature of that industry and its necessary interest in considerations of public confidence, safety and welfare.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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